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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1307

EVERETT L. TURPIN,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. .....

EVERETT L. TURPIN,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The case was commenced and tried in the Circuit Court of Jackson County, Missouri, at Kansas City. No opinion was written by the trial court. A copy of its judgment appears in Petitioner's Brief as Exhibit D at page A33. There is only one opinion of the Supreme Court of Missouri which is its *en Banc* opinion appearing as Exhibit C

beginning at page A15 of Petitioner's Brief. The opinion of Division One of the Supreme Court of Missouri printed in Petitioner's Brief as Exhibit A commencing at page A1 was not adopted by the Court *en Banc* and is a nullity.

QUESTION PRESENTED

Respondent submits that the sole question presented is whether the Supreme Court of Missouri *en Banc* erred in following the decisions of this Court in *Baker* v. *Texas & Pacific R. R.*, 359 U.S. 227 (1959) and *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U.S. 84 (1915) and in holding that the question of whether Petitioner was an employee of Respondent within the meaning of the Federal Employers' Liability Act (45 U.S.C., Sec. 51) is to be determined by general law principles, and in further holding that the terms "employee" and "employer" are not used in said Act in any special sense.

Respondent further submits that in effect by Petitioner's plea to this Court, he asks this Court to overrule well founded opinions that the extension of coverage of the Federal Employers' Liability Act to include persons other than railroad employees in the traditional sense is a legislative and not a judicial function.

STATEMENT OF THE CASE

Petitioner Everett L. Turpin, a truck driver for Burlington Truck Lines, a corporation, brought suit against Chicago, Burlington & Quincy Railroad Company claiming that at the time of his injury he was an employee of the railroad and was entitled to sue under the Federal Employers' Liability Act.

Petitioner was injured on March 11, 1961, while unloading a "Piggy Back" trailer from a railroad flat car of Chicago, Burlington & Quincy Railroad Company at its

"Piggy Back" unloading yard in North Kansas City, Missouri. At the time of the injury and for four years prior thereto Petitioner was employed as a truck driver for Burlington Truck Lines, a corporation, and he belonged to the Teamsters' Union (A. F. of L.) which was the union at Burlington Truck Lines (T. 126). In this employment he was under social security (T. 219) and state workmen's compensation (T. 124, 125). Petitioner's time records each day were turned over to his dispatcher for Burlington Truck Lines and Petitioner was paid his wages by Burlington Truck Lines (T. 133). After Petitioner was hurt he reported to Burlington Truck Lines (T. 123). He filed a claim against Burlington Truck Lines for workmen's compensation benefits for the injury of March 11, 1961 and was paid workmen's compensation by the Truck Lines (T. 124, 125).

The business of Burlington Truck Lines was the transportation of commodities in general, operating under Interstate Commerce Commission Permit No. 107500 as a common carrier serving the public (T. 217). It operated in excess of 9000 miles of routes; employed approximately 2100 pieces of vehicular equipment, such as tractors, trailers and trucks, and owned its own general office building in Galesburg, Illinois (T. 217). In 1961 it employed approximately 1500 employees, plus 108 supervisory people directing the work of others. Its policies were determined by its own Board of Directors. It paid its own taxes of every kind, hired and fired its employees and maintained its own records, bank accounts and transacted all its business affairs. Its capital stock was wholly owned by the Chicago, Burlington & Quincy Railroad Company.

The Chicago, Burlington & Quincy Railroad Company is a railroad corporation licensed by the Interstate Commerce Commission as a carrier by rail. It has no facilities on any part of its system for unloading trailers shipped on railroad

flat cars "Piggy Back," and wherever the railroad avails the public of the service of shipping trailers on flat cars it has contracts with others, including Burlington Truck Lines on the Burlington Truck Lines system, for loading and unloading of trailers on and off of its flat cars (T. 258). In 1961 the railroad had a contract with Burlington Truck Lines covering the loading and unloading of piggy-back trailers on and off of flat cars at the unit price of $10.05 per loaded trailer paid by the railroad to the Truck Lines (T. 244). The trial court and the Supreme Court of Missouri *en Banc* concluded that the Chicago, Burlington & Quincy Railroad Company contracted with the Truck Lines to load and unload trailers on and off of its flat cars as an independent contractor, that nothing was done to impair that relationship, and that Petitioner remained solely the employee of the Truck Lines. At the time Petitioner was injured no railroad employee was present (T. 117, 118, 119). Information concerning the piggy-back cars to be unloaded that day was obtained by Petitioner or his helper from the Truck Lines teletype (T. 116). The labor agreements of the railroad are all with the various seventeen railroad brotherhoods and none are with Petitioner's union (T. 265). The railroad employees are under the Railroad Retirement Act for retirement, sickness and accident benefits (T. 265) and are not under state workmen's compensation and social security as was Petitioner (T. 124, 125, 219).

ARGUMENT

I

The Terms "Employee" and "Employer" Are Used in Their Usual and Natural Sense in the Federal Employers' Liability Act

The Supreme Court of Missouri *en Banc* correctly stated and followed the law of this Court and the general

law in holding that the burden of proving employment of Petitioner by the railroad is on the Petitioner in a case under the Federal Employers' Liability Act and that the terms "employee" and "employer" are used in the Act in their usual and natural sense. As it is said in *Baker* v. *Texas and Pacific Ry. Co.*, 359 U.S. 227, 228 (1959):

> "The Federal Employers' Liability Act does not use the term 'employee' and 'employer' in any special sense, *Robinson* v. *Baltimore & Ohio Railroad Company*, 237 U.S. 84, 94, 35 S. Ct. 491, 59 L. Ed. 849, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act. See *Linstead* v. *Chesapeake & Ohio Railroad Company*, 276 U.S. 28, 33, 34, 48 S. Ct. 241, 243, 72 L. Ed. 453. It has been well said of the question that each case must be decided on its own peculiar facts and ordinarily no one feature of the relationship is determinative."

The Fifth Circuit considered an almost identical case wherein the sole issue was whether a deceased truck driver was an employee of the railroad in an action under the Federal Employers' Liability Act. The District Court had held that there was no genuine issue of fact, and that no reasonable man could differ with the conclusion that the deceased was not an employee of the railroad at the time of his death. The Fifth Circuit in a *per curiam* opinion said in *Denia M. Fawcett, Admx.* v. *Missouri Pacific R. R. Co.*, 347 F. 2d 233 (5th Cir., 1965), *certiorari* denied 382 U.S. 907 (1965):

> "The various relevant factors under the law in determining whether the injured or killed person was an employee of the railroad carrier with respect to the Federal Employers' Liability Act have been ruled on several times by Supreme Court," (citing *Baker* v.

Texas and Pacific Ry. Co., supra, Ward v. *Atlantic Coast Line R. R. Co.*, 362 U.S. 396, 400 (1960), and *Sinkler* v. *Mo. Pac. R. R. Co.*, 356 U.S. 326 (1958), rehearing denied 356 U.S. 978 (1958)).

Although the *Ward* and *Sinkler* cases are concerned with an "agent" under the Federal Employers' Liability Act as opposed to an "employee," these cases as well as *Baker, Robinson* and *Linstead,* supra, establish that this Court has often stated definite criteria for determining who is an employee and who is an agent under the Act; that the test is rooted in well established general federal law principles; and that Congress did not change these criteria in passing the Federal Employers' Liability Act. There are numerous other federal opinions to support this law including *Jones* v. *New York Central R. R.*, 182 F. 2d 326 (6th Cir., 1950); *Gloster* v. *Pennsylvania R. R.*, 214 F. Supp. 207 (W.D. Pa., 1963).

Since this Court has established certain criteria for determining who is an employee within the Act and since the Supreme Court of Missouri has demonstrated in its opinion that it recognized, followed and decided this case in accordance with these criteria, and since Petitioner fails to establish otherwise, it would appear that no question is presented under Rule 19 of this Court for review on *certiorari* and that the petition should therefore be denied. Apparently Petitioner's chief complaint is that the trial court and the Missouri Supreme Court *en Banc* did not decide the case in accordance with his interpretation of the evidence. No "special and important reasons" are presented which require this Court to take jurisdiction. It appears that the questions which Petitioner has undertaken to present consist of nothing more or less than "an invitation" to this Court to "try the case de novo."

The following language used by this Court in the case of *Timkin Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596-97 (1951), seems to be pertinent:

> "For the most part this shotgun approach is actually only a dispute as to the proper inference to be drawn from the evidence in the record; in effect, it is an invitation to us to try the case de novo. This Court must decline such an invitation just as it does when the Government makes the same request. United States v. Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150."

Respondent submits that the questions sought to be presented by Petitioner are not of such character as to require the consideration of this Court under its rules.

Petitioner's attempt to establish that Jones Act cases must be submitted to the jury even though the Court finds insufficient evidence of the relationship of an employee and employer is not sound. In a recent opinion of the Second Circuit in *Schiemann* v. *Grace Line*, 269 F. 2d 596 (2nd Cir., 1959), it was stated that a case under the Jones Act is not for the jury where reasonable men could not differ. In all of the Jones Act cases cited under Petitioner's point 1, qualifying words are found such as "if a finding on this question has evidence to support it" or "if it has a reasonable basis." The necessity of having "evidence to support" a finding or a "reasonable basis" for such finding is a part of the well established general law. It was the law applied in this case by the Missouri Supreme Court *en Banc* whose opinion reads in part:

> "We have concluded that defendant contracted with Truck Lines to load and unload as an independent contractor, and nothing was done to impair that relationship, and that plaintiff remained solely the employee of the Truck Lines. We further find that on this issue reasonable minds could not differ, and

that the trial court properly sustained defendant's motion for judgment and entered judgment for it." (Petitioner's Brief A33).

Petitioner relies on *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500 (1957), as demonstrative of Petitioner's argument that the words "employer" and "employee" are not to be given their natural and ordinary meaning in Federal Employers' Liability Act cases and Petitioner therefore argues that courts are bound to apply a different standard in Federal Employers' Liability Act cases in determining who is an employee. The *Rogers* case does not support this argument. It involved the issue of negligence or proximate cause under the Federal Employers' Liability Act as was pointed out by this Court under Paragraphs [9-10] of its opinion where it is stated:

> "The Congress when adopting the law was particularly concerned that the issue whether there was fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the Courts developed concepts of assumption of the risk and of the coverage of the law which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact finding function of the jury the decision of the primary question raised in these cases—whether employer's fault played any part in the employee's mishap."

The *Rogers* case as it relates to an employer's fault or negligence does not modify the rule of applying general federal law in determining who is an employee within the

Act. As so aptly put by the Sixth Circuit in *Jones* v. *New York Central R. R.*, 182 F. 2d 326, 328 (6th Cir., 1950), a case in which it was held that an express messenger while on duty in an express railway car forming a railroad train was not an employee of the railroad:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company would be liable under the Act."

Also, *Gaulden* v. *Southern Pacific Co.*, 78 F. Supp. 651, 656 (N.D. Cal., 1948), emphasizes the fact that the Federal Employers' Liability Act has not changed the commonly known concept of the employee-employer relationship when it states:

> "The remedial and humanitarian purposes of the Employers' Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmen's Compensation Act of California are available to him. It is not for the Courts to extend coverage of the Liability Act into new fields. During the 40 years of the Employers' Liability Act, Congress, while liberalizing its benefits, has not seen fit to extend the scope of the Statute beyond railroading in its true sense."

Petitioner relies on the following cases wherein the injured party was in the general employ of the defendant railroad. Not one of these cases involves an employee of

an independent contractor of the railroad. These cases include *Gallick* v. *The Baltimore and Ohio R. R. Co.*, 372 U.S. 108 (1963); *Shenker* v. *Baltimore & Ohio R. R. Co.*, 374 U.S. 1 (1963); *Sinkler* v. *Missouri Pacific R. R. Co.*, 356 U.S. 326 (1958), rehearing denied 356 U.S. 978 (1958); *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 50 (1957); and *Reed* v. *Pennsylvania R. R.*, 351 U.S. 502 (1956).

Another group of Federal Employers' Liability Act cases cited by Petitioner includes *Baker* v. *Texas and Pacific Ry. Co.*, 359 U.S. 227 (1959), *Byrne* v. *Pennsylvania R. R.*, 262 F. 2d 906 (3rd Cir., 1958), as amended on denial of rehearing (1959), and *Cimorelli* v. *New York Central R. R.*, 148 F. 2d 575 (6th Cir., 1945). In each of these cases the courts found that the evidence contained factual elements of control over the plaintiff by the railroad under the master and servant rule sufficient to make a case for the jury on the question of employment by the railroad. In our case both the trial court and the Missouri Supreme Court *en Banc* found that reasonable minds could not differ on the ultimate fact that Petitioner was not an employee of the railroad.

There are a number of District Court and Circuit Court citations on pages 15, 17, 18 and 19 of Petitioner's Brief which are cited apparently to show that the principles of the *Rogers* case, which principles relate to fault and negligence, also should apply to the determination of who is an employee and who is an employer. But as we read the cases they do not support Petitioner's contention. In *Dixon* v. *Serodeno*, 331 F. 2d 668 (6th Cir., 1964), it was held that in Jones Act cases substantive federal law controls and the Court discussed the rule that a presumption that defendant used ordinary care does not forbid jury from finding against the presumption. *Nelson* v. *Green Line Steamers*, 255 F. 2d 31, 34 (6th Cir., 1958), involved a question of procedure.

The rule involved was that the personal representative of a seaman is entitled under the Jones Act to trial by jury, however the parties in the case waived a jury and the court tried the case without a jury and the question was raised whether appellant received a hearing upon the merits to which he was entitled. In *Adams* v. *Kelly Drilling*, 273 F. 2d 887 (5th Cir., 1960), the Circuit Court affirmed the action of the trial court in holding that there was sufficient evidence of negligence to support a jury verdict for defendant and the Circuit Court refused to grant new trial on claimed errors in instructions. Similarly inapplicable is *Offshore Company* v. *Robinson*, 266 F. 2d 769 (5th Cir., 1959). While this case includes the generally accepted language that a jury is allowed to decide who are seamen under the Jones Act, it also states (under paragraph [4]) that the traditional function of court and jury still obtains and that a trial or appellate court may in the proper case hold that there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman of a crew of a vessel under the Jones Act. *Keynon* v. *Tennessee Towing Co.*, 296 F. 2d 785 (6th Cir., 1961), was an action involving injuries sustained by the plaintiff in cleaning a vessel. A judgment was for the plaintiff on the issue of negligence and unseaworthiness. The Circuit Court affirmed this result as there was substantial evidence to support the findings of the jury that the plaintiff was at the time of his injury a seaman within the meaning of the Jones Act. A similar result was reached in *Mach* v. *Pennsylvania R. R. Co.*, 317 F. 2d 761 (3rd Cir., 1963), which was an action under Jones Act in which judgment in the trial court was for plaintiff. The Court of Appeals held that the evidence was sufficient to raise a jury question as to whether the bargeman was a seaman and as to whether defendant's negligence was cause of injury. The case of *Bernardo* v. *Bethlehem Steel Co.*,

314 F. 2d 604 (2d Cir., 1963), merely states the well-known rule that findings, whether by judge or jury, must be sustained on appeal unless "clearly erroneous" or if there is no "reasonable basis" to support them. The case of *Ratigan* v. *New York Central R. R.*, 291 F. 2d 548 (2d Cir., 1961), likewise does not support Petitioner's contentions. The case involved an action by a brakeman against his railroad employer. No question of employment arose, but rather only the question of negligence. The Court held that on the question of negligence the employee is given the benefit of every doubt. In the case of *Kodack* v. *The Long Island R. R. Co.*, 342 F. 2d 244 (2d Cir., 1965), the plaintiff sued his railroad employer and the only question was with regard to the negligence of railroad.

II

Opinion of Division One of Missouri Supreme Court a Nullity

The factual and legal conclusions of Commissioner Welborn of Division 1 of the Missouri Supreme Court, as set out beginning at page A1 of the Appendix to Petitioner's Brief, were based upon a misunderstanding and a misinterpretation of the evidence and said conclusions were not adopted by the Supreme Court of Missouri *en Banc*. The opinion was set aside by the Court *en Banc* and the case was transferred to the Court *en Banc* (R. 366). There is only one opinion of the Court and that was adopted *en Banc* and filed on January 10, 1966. The opinion appears in the Petition for Writ of Certiorari filed herein at page A15 as Exhibit C. When a rehearing is granted or a case is transferred from a division of the Supreme Court of Missouri to the Court *en Banc*, as was done here, the case stands as if it had not been previously

heard and submitted. When the original divisional opinion of the Supreme Court is rejected on rehearing it becomes a nullity as though it had never been written. *In re Thomasson's Estate,* 192 S.W. 2d 867 (S. Ct. Mo., 1946). This is also stated in the matter of *In re McMenamy's Guardianship,* 270 S.W. 663 (S. Ct. Mo. *en Banc,* 1925), wherein the Supreme Court of Missouri *en Banc* on Motion for Rehearing refused to consider a divisional opinion which was not adopted *en Banc* and stated, at l.c. 667:

> "Although printed in appellant's briefs here, it is not an opinion for our consideration. * * * It was no opinion and as such required no mention."

Again the Supreme Court of Missouri *en Banc,* in *Morgan* v. *Kroger Grocery & Baking Co.,* 154 S.W. 2d 44 (S. Ct. Mo. *en Banc,* 1941), said that a case transferred to the Court *en Banc* after a divisional opinion stands as if it had not been previously heard and submitted.

III

Opinion of Missouri Supreme Court Is Not in Conflict with Opinions of This Court

Petitioner says the opinion of the Missouri Supreme Court is in conflict with *Baker* v. *Texas and Pacific Ry. Co., supra, Sinkler* v. *Missouri Pacific R. R. Co., supra,* and *Ward* v. *Atlantic Coast Line Ry. Co., supra,* but we do not agree. We have commented above on *Baker.* Sinkler was an employee of the Missouri Pacific Railroad Company whom he sued. He was injured by the fault of an employee of the crew of the Houston Belt and Terminal Railway which was switching the car in which plaintiff was working for his employer, the Missouri Pacific. The question was whether the Belt in doing the switching was an agent for the Missouri Pacific so as to make the Missouri Pacific liable to plaintiff and thus the case is not

pertinent to our case. Likewise in the *Ward* case the plaintiff was employed by the defendant railroad and he was working on a Saturday (not a railroad work day) on a privately owned siding and for the owner of the siding which was not the railroad. This Court held that the company which owned the siding and which had engaged the railroad's foreman and his crew which included the plaintiff to make a repair on the siding on their day off was not the agent of the railroad within the meaning of the Federal Employers' Liability Act although using the work tools supplied by the railroad and following the standard railroad methods for doing the work.

IV

Employees of Burlington Truck Lines Remained Its Employees

There are many Federal Employers' Liability Act cases in which this Court and other courts have recognized the independent contractor relationship and they hold that the term "employee" is to be given its usual and natural meaning under Federal Employers' Liability Act litigation. The opinion of the Supreme Court of Missouri shows the Court considered and followed these cases which include: *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920); *Chicago, Rock Island & Pacific Ry. Co.* v. *Bond*, 240 U.S. 449 (1916); *Fawcett* v. *Missouri Pacific R. R. Co.*, 242 F. Supp. 675 (W.D. La., 1965), aff'd 347 F. 2d 233 (5th Cir., 1965), certiorari denied 382 U.S. 907 (1965); *Schiemann* v. *Grace Line, Inc.*, 269 F. 2d 596 (2d Cir., 1959); *Latsko* v. *National Carloading Co.*, 192 F. 2d 905 (6th Cir., 1951); *Jones* v. *New York Central R. R.*, 182 F. 2d 326 (6th Cir., 1950); *Valentine* v. *South Coast Corp.*, 218 F. Supp. 148 (E.D. La., 1963); *Gloster* v. *Pennsylvania R. R.*, 214 F. Supp. 207 (W.D. Pa., 1963); *De Paola* v.

New York, New Haven & Hartford R. R. Co., 198 F. Supp. 12 (D. Conn., 1961); *Gaulden* v. *Southern Pac. Co.*, 78 F. Supp. 651 (N.D. Cal., 1948); *Aguirre* v. *Southern Pac. R. R.*, 43 Cal. Rept. 2d 73 (Ct. App. Cal., 1965).

V

Burlington Truck Lines Was a Wholly Independent Entity

There is also no merit in Petitioner's argument that the Burlington Truck Lines had existence in form only. In the absence of fraud, connivance or an undue domination, the law recognizes the separate entities of corporations, even though one owns the stock of the other. *Fawcett* v. *Missouri Pacific R. R. Co.*, 242 F. Supp. 675 (W.D. La., 1965), aff'd 347 F. 2d 233 (5th Cir., 1965), certiorari denied 382 U.S. 907 (1965); *Garrett* v. *Southern Ry. Co.*, 173 F. Supp. 915 (E.D. Tenn., 1959), aff'd 278 F. 2d 424 (6th Cir., 1960); *Gaulden* v. *Southern Pac. Ry.*, 78 F. Supp. 651 (N.D. Cal., 1948); *Kentucky Electric Power Co.* v. *Norton Coal Mining Co.*, 93 F. 2d 923 (6th Cir., 1938). There is nothing in the record in our case suggesting fraud or any collusive device. The Burlington Truck Lines was a wholly independent entity, serving the public generally over a far-flung territory, hiring and firing its own employees, paying its own taxes and expenses, carrying its own workmen's compensation insurance (T. 124, 125) and other insurance, owning its own equipment and controlling its own independent operations. It performed similar work in loading and unloading trailers in other places for various freight forwarders (T. 214-226).

We respectfully submit that the Petitioner has completely failed to present any reason why this Court, in the exercise of a sound judicial discretion, should allow a review of the decision and judgment of the Supreme Court of Missouri *en Banc* and that the writ should therefore be denied.

Respectfully submitted,

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